

World Fashion, Inc. and Garment Workers' Justice Center, International Ladies' Garment Workers' Union, Western States Region, AFL-CIO.
Case 21-CA-29600

March 8, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

Administrative Law Judge Frederick C. Herzog has found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging five employees and that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about union activities, instructing employees not to talk to union adherents, and threatening to discharge employees for their union activities.¹ The Respondent does not contest the unfair labor practice findings in its exceptions, but it contends that it is not now an employer and that certain individuals are not now its supervisors or agents because it allegedly went out of business in 1994.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.² We note that the Respondent will have the opportunity in compliance proceedings to litigate the remedial consequences, if any, of its alleged cessation of operations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, World Fashion, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Rescind the unlawful layoffs and discharges of employees Santiago Rodriguez, Ramiro Rodriguez, Jose Alonzo Jiminez, Alma Aleman, and Jose Luis Mora Rodriguez, and offer each of them immediate, full, and unconditional reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and

¹ On October 20, 1995, the judge issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² The judge inadvertently failed to specify in his recommended Order and notice that the reinstatement offers to the unlawfully laid-off or discharged employees shall be immediate. He also inadvertently failed to include the standard provision in the Order requiring the Respondent to provide the Regional Director written notice of its compliance. We have amended the Order and notice accordingly.

privileges previously enjoyed, and make them whole for all loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, as set forth in the remedy section of the judge's decision.”

2. Insert the following as paragraph 2(e).

“(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their own or other employees' union activities.

WE WILL NOT instruct employees not to talk to fellow employees who are known to be supporters of Garment Workers' Justice Center, International Ladies' Garment Workers' Union, Western States Region, AFL-CIO or any other labor organization.

WE WILL NOT threaten employees with discharge because of their union or other protected concerted activities.

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our unlawful layoffs and discharges of Santiago Rodriguez, Ramiro Rodriguez, Jose Alonzo Jiminez, Alma Aleman, and Jose Luis Mora Rodriguez, and offer each of them immediate, full, and unconditional reinstatement to their former positions of employment with us, without prejudice to their seniority or any other rights or privileges previously enjoyed or, if those positions no longer exist, to substantially equivalent positions, and WE WILL make them whole for any loss of earnings and other

benefits suffered as a result of the discrimination against them, with interest.

WE WILL expunge from our files any references to the unlawful layoffs and discharges of Alma Aleman and Jose Luis Mora Rodriguez on August 27, 1993, and, of Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez on July 13, 1993, and WE WILL inform these employees that this has been done, and that these unlawful actions will not be used against them in any manner in the future.

WORLD FASHION, INC.

Jean C. Libby, Esq., for the General Counsel.

Thomas M. Comparet, Esq., of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Los Angeles, California, on December 20, 1994, and is based on a charge filed by the Garment Workers' Justice Center, International Ladies' Garment Workers' Union, Western States Region, AFL-CIO (the Union) on September 3, 1993, alleging generally that World Fashion, Inc. (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 51 et seq. (the Act). On June 29, 1994, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1)¹ and (3)² of the Act.

Respondent thereafter filed a timely answer to the complaint, denying all wrongdoing. As to the first allegation, Respondent asserts that Ramiro Rodriguez,³ Santiago Rodriguez, and Jose Alonzo Jiminez, if they were discharged

¹ Sec. 8(a)(1) of the Act provides that, "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"

Sec. 7 of the Act provides that, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

² Sec. 8(a)(3) of the Act provides that, "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

³ In light of the fact that a number of the witnesses, or persons referred to in the record, have names which are similar to other persons referred to by the record I have erred on the side of avoiding error, and have referred to all persons by their full names. (There were four Kangs, two Rodriguezes, two Almas, two Moras, two Joses, one Pepa, and one Pepe.)

at all,⁴ were discharged for economic reasons, or "were terminated due to their refusal to accept the new piece work rate." As to the second allegation, Respondent asserts that Jose Luis Mora Rodriguez and Alma Aleman were terminated "along with others, for lack of work and need for their services." Finally, Respondent has not addressed the separate 8(a)(1) allegations, beyond a general denial of wrongdoing.⁵

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and the Respondent admits, that the Respondent is a California corporation, with an office and place of business in Los Angeles, California, where at all times material it has been engaged in the business of sewing garments in the apparel and clothing industry; and that during the 12-month period ending on June 29, 1994, and in the course and conduct of its business operations, it performed sewing services valued in excess of \$50,000 for enterprises located within the State of California, each of which during the same period of time sold and shipped goods valued in excess of \$50,000 directly to points outside the State of California.

Accordingly, I find and conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The complaint alleges

1. That Ramiro Rodriguez, Santiago Rodriguez, and Jose Alonzo Jiminez were discharged on July 13, 1993, because they engaged in protected concerted activities, and that their discharges were designed to discourage employees from engaging in concerted activities in violation of Section 8(a)(1) of the Act.

2. That on or about August 27, 1993, Respondent terminated Jose Luis Mora Rodriguez and Alma Aleman because of their union activities, to discourage membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

3. And that during July and August of 1993, Respondent committed three additional violations of Section 8(a)(1), which interfere with, restrain, and coerce employees in the

⁴ Respondent attempted to withdraw from its judicial admission that it discharged these employees. This matter is dealt with below.

⁵ Despite this failure, I consider possible defenses below.

exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

B. Supervisors and Agents

The complaint alleges, the Respondent admits, and I find that, at all times material, Sun Alma Kang, Pepe Kang, and Pepa Kang have been, and are now, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act. In addition, John Kang admitted having responsibility for making firing and disciplinary decisions about employees. This admission was confirmed by documentation in Respondent's exhibits.

Therefore, I find that, at all times material, Sun Alma Kang, Pepe Kang, Pepa Kang, and John Kang have been, and are now, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

C. The Discharges of Ramiro Rodriguez, Santiago Rodriguez, and Jose Alonzo Jiminez

Ramiro Rodriguez testified that prior to being discharged in July 1993, he had worked for Respondent since 1988.

In 1991, Ramiro Rodriguez became involved in union activities through the Garment Worker's Justice Center, which is sponsored by the International Ladies' Garment Workers' Union. Part of this involvement consisted of attending union meetings on Wednesday afternoons. The meetings were typically also attended by seven or eight other employees of the Respondent. Throughout his tenure with Respondent, Ramiro Rodriguez often met with the supervisors, sometime alone, but often with others, to complain about the piece rates which employees were receiving. His involvement with the Union was sometimes mentioned in a hostile tone by the Respondent's supervisors during these meetings.⁶

On several occasions these meetings were followed by collective work stoppages, during which several workers would stand at their machines without working for approximately an hour at a time. Usually these stoppages would simply end by the employees' mutual agreement, and the employees would return to their assigned work. On three occasions, however, in retaliation for these work stoppages, Respondent disabled the employees' machines and sent protesting employees home. Employees were sent home under these circumstances in 1988, 1991, and finally in 1993. So far, however, as is shown by the record, no charges were filed concerning these incidents.

⁶ This history of collective complaint about wages was admitted by Sun Alma Kang in her testimony:

JUDGE HERZOG: Do you remember them complaining more than once?

THE WITNESS: Yes.

JUDGE HERZOG: Do you remember one of them being the spokesman or the person who spoke the most?

THE WITNESS: They are talking together, always.

JUDGE HERZOG: Did any one of them speak more, or did all of them tend to speak?

THE WITNESS: Is the same.

JUDGE HERZOG: Can you recall any of the subjects that they complained about?

THE WITNESS: Most of the problem is the price.

After the 1988 and 1991 incidents the employees were quickly called back to the factory. For example, after the 1991 incident, Ramiro Rodriguez returned to work the next day because Pepe Kang called Ramiro Rodriguez at home and said that "there was no problem, I could go back to work." Respondent's failure to call Pepe Kang to testify about these events leaves this testimony uncontradicted. Further, despite Sun Alma Kang's denial of any knowledge of these events,⁷ this history of work stoppages and subsequent employer actions is uncontested.

The last such collective work stoppage occurred on July 13, 1993. On that date, Ramiro Rodriguez, Santiago Rodriguez, Jose Alonzo Jiminez, and four other employees met with Sun Alma Kang in her office for about 20 minutes to protest the piece rate offered by the Respondent. Sun Alma Kang told the employees that she could not negotiate the rate because her computer wasn't working and she therefore could not look up previous piece rates.

The evidence as to what occurred after Sun Alma Kang made these statements diverges.

Ramiro Rodriguez testified that Sun Alma Kang then told the employees that if they didn't want to do the job they could go home. Ramiro Rodriguez responded that he couldn't go home, and that he needed a higher piece rate. She then repeated her previous statement to the effect that if they didn't want to do the job they could go home. Ramiro Rodriguez, Santiago Rodriguez, and Jose Alonzo Jiminez then left Sun Alma Kang's office and "stood" by their machines for about 20 minutes. Ramiro Rodriguez testified that at this point, "Pepe came [in] very angry, yelling at us, and he removed the thread from the machines and broke the machines and fired us."

Q. What did you say to him?

A. (Through Interpreter) Nothing. We left.

Q. When you say he fired you, what did he say to you?

A. "He [Pepe] said we were too crazy and to go home."

Q. Tell us again, in more detail, what did he do to your machine?

A. (Through Interpreter) He removed the thread or broke the threads. He removed some of the pieces so the machine wouldn't work, and disconnected them.

Ramiro Rodriguez noted that he did not request to return to work after this incident. When asked why, Ramiro Rodriguez stated that, having been fired, Respondent would have to call him prior to his being able to return, but that it had not done so.

In contrast to the above testimony, Sun Alma Kang stated that Ramiro Rodriguez, Santiago Rodriguez, and Jose Alonzo Jiminez told her that they "cannot make it," suggesting to her that they would not agree to do the work at the lower piece rate. Thereafter, these employees walked out of her office and stood outside for a brief time. After talking to each other they returned to her office and told her that they wanted to go to the unemployment office.

Despite Sun Alma Kang's testimony, however, John Kang later admitted having discharged these employees. In his testimony, John Kang said that he had earlier decided to dis-

⁷ Sun Alma Kang testified only that she "didn't see it happen."

charge these employees after Sun Alma Kang informed him that employees were unwilling to work at the going piece rate. John Kang stated that the reason he discharged them was because "the price they were asking, I couldn't pay, and . . . if I lose my due date, which I promise the customer I finish the product by then, I lose everything. I can't get paid . . . I didn't want that to happen. So if they can't do it for me I have to find someone that could do it."

Given Ramiro Rodriguez credible testimony regarding being fired and the history of work stoppages and employer reactions, Respondent's failure to call Pepe Kang to testify about his alleged disabling of the machines, and Sun Alma Kang's unconvincing denial of these events, I find that on July 13, 1993, Pepe Kang disabled the machines of Ramiro Rodriguez, Santiago Rodriguez, and Jose Alonzo Jiminez, told them to go home, and fired them.

Counsel for the General Counsel argues that Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez were fired on July 13, 1993, for engaging in a protected work stoppage, and that they were not permitted to continue working at Respondent's facility thereafter.

Respondent argues that Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez voluntarily terminated their own employment with Respondent and, therefore, were not terminated for a proper work stoppage protest. The Respondent argues in the alternative that, even if these employees were terminated, they were "terminated due to their refusal to accept the piece work rate."

Respondent's primary argument that Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez voluntarily terminated their employment is contradicted by Respondent's judicial admissions. In particular, the complaint, at paragraph 7(a), states that:

About July 13, 1993, Respondent discharged employees Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez.

During the hearing, when questioned about the meaning of omissions and/or ambiguities in the Respondent's answer to the complaint, Respondent's counsel stated as follows, concerning this allegation:

JUDGE HERZOG: Paragraph 7(a) is to be admitted by Respondent.

MR. COMPARET: Correct, Your Honor.

Accordingly, Respondent's argument on brief that Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez had "already decided to voluntarily terminate their employment," will be disregarded, as it is clearly an attempt to unfairly raise an argument previously waived by Respondent's judicial admission.

Regardless of Respondent's counterargument, however, the primary question here is whether the discharge violated Section 8(a)(1) of the Act, as alleged.

Under long-established legal principles, employees who engage in a peaceful work stoppage to protest unacceptable terms or conditions of employment are engaged in protected concerted activity within the meaning of Section 7, and a labor dispute with the meaning of Section 2(9) and Section

2(3) of the Act.⁸ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Therefore, employers who discharge workers for engaging in this type of protected activity violate Section 8(a)(1) of the Act. *NLRB v. Washington Aluminum Co.*, *ibid.*; *Quality C.A.T.V.*, 278 NLRB 1282 (1986); *Cristy Janitorial Service*, 271 NLRB 857 (1984); *Go-Lightly Footwear*, 251 NLRB 42 (1980).

Further, this same result can be derived by using the Board's general 8(a)(1) test, as enunciated in *Meyers Industries*, 268 NLRB 493 (1985). Under this test, the General Counsel succeeds in demonstrating a prima facie case that an employer has violated Section 8(a)(1) when evidence shows that:

1. The employee has engaged in concerted activity (acting with or on the authority of other employees).
2. The employer knew of the concerted nature of the activity.
3. The concerted activity was protected by the Act.
4. The adverse employment action was motivated by the employee's protected concerted activity.

Id. at 497 fn. 23 (1984), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *reaffd.* 281 NLRB 882 (1987); *Morton International*, 315 NLRB 564 (1994).

There is no question that counsel for the General Counsel has met the first requirement that the activity be concerted. This is amply demonstrated by Sun Alma Kang's admission that seven employees simultaneously came to her office as a group to protest the piece rate. After leaving the meeting three of these employees immediately engaged in a simultaneous work stoppage. Therefore, this case presents a clear example of employees acting together to deal with their employer when seeking to improve their wages. Such actions are obviously at the very core of concerted activity.

In addition, counsel for the General Counsel has demonstrated that Respondent had knowledge of the concerted nature of the activity. As shown just above, Respondent readily admitted that a number of workers were involved in a meeting with Supervisor Sun Alma Kang, and that the subject of the meeting was the effort of the employees to demand higher piece rates. Throughout Sun Alma Kang's testimony she continually referred to this group of employees with the pronoun "they," showing that she, herself, viewed the employees as a group acting collectively. Nor is there any question that following the meeting some of the employees were seen by Respondent's agents simply standing by their machines, rather than working. Finally, Respondent reacted to the ensuing work stoppage by simultaneously discharging a group of three employees.

In each instance just cited, Respondent was shown to have observed first hand the activities of its employees as they engaged in protected, concerted activities. Therefore, I find that Respondent had knowledge of the concerted nature of the activity.

Because the protest pertained to wages, each of the activities is clearly within Section 2(9)'s definition of a labor dispute, which includes "any controversy concerning terms,

⁸Sec. 2(9) of the Act defines a labor dispute as "any controversy concerning terms, tenure or conditions of employment." Sec. 2(3) of the Act defines "employee" to include employees whose work has ceased due to a labor dispute.

tenure or conditions of employment.” *NLRB v. Washington Aluminum Co.*, supra at 15.

The law has long been clear that, barring an infringement on the employer’s private property rights (an element not even claimed to be present in this case, because the evidence is clear that the employees promptly and peacefully left when told to do so), this type of concerted activity is fully entitled to protection under the Act. *NLRB v. Washington Aluminum Co.*, *ibid.* at 15; *Hundgens v. NLRB*, 424 U.S. 507, 522 (1976); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Cambro Mfg. Co.*, 312 NLRB 634 (1993); *United Enviro Systems*, 301 NLRB 942 (1991).

Finally, it appears clear that the discharge of these employees was motivated by the employees’ protected activities. Motivation can be demonstrated by the timing of discharges soon after a work stoppage. *City Dodge Center*, 289 NLRB 194 (1988); *Goebert Mechanical Corp.*, 302 NLRB 185 (1991). *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349 (7th Cir. 1987). Timing alone may suggest antiunion animus as a motivating factor in an employer’s action. In this case the discharge occurred during a work stoppage, making an extremely clear demonstration that the employees’ protected activity, i.e., the stoppage, was the cause of the discharge. Therefore, counsel for the General Counsel has succeeded in establishing a prima facie violation of Section 8(a)(1) of the Act.

Once a prima facie case of discrimination has been established, the burden shifts to the Respondent to establish that these employees would have been discharged regardless of the discrimination. See discussion of *Wright Line*, *infra*. Towards this goal, Respondent’s closing brief relies primarily on the argument that Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez voluntarily quit, and were, therefore, not discharged at all. As I have found above, however, this argument is contrary to Respondent’s admissions, and should be disregarded for that reason. Moreover, any such argument is inconsistent with virtually all the testimony given at trial, including that of Respondent’s witnesses.

Alternatively, Respondent put forth the argument that even if these employees were terminated, they were “terminated due to their refusal to accept the piece work rate.”

First of all, it has been demonstrated that Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez were engaged in concerted activity, protected under the Act. Therefore, Respondent’s argument that Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez “were terminated due to their refusal to accept the new piece work rate,” even if taken as true, would not be a defense. Instead, it serves as an admission by Respondent to a violation of Section 8(a)(1) of the Act.

But, even more important, there is not a shred of evidence to support the statement. The only evidence in the record is to the effect that during a protected work stoppage employees were informed that they were fired, and given the choice of abandoning their protected work stoppage or going home. Simultaneously, their machines were disabled by the Respondent. Under such circumstances, the offenses were complete when they were told they were fired, and given an illegal choice to make. Thus, it makes no difference legally that they did not thereafter seek reemployment. Nevertheless, the fact that Respondent made no effort to have the employees

return to their work, unlike its practice in the past, serves only to reinforce the conclusions I have reached above.

Therefore, I find that Respondent has failed to present any persuasive evidence or argument that the employees would have been discharged regardless of the demonstrated protected concerted activities.

Accordingly, I also find that Respondent violated Section 8(a)(1) of the Act by discharging Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez, and I shall order an appropriate remedy therefor.

D. The Discharges of José Luis Mora Rodriguez and Alma Aleman

José Luis Mora Rodriguez and Alma Aleman began working for Respondent in April and May 1992, respectively. Both employees had been involved with the Union as early as August 1992, and had attended weekly union meetings, occasionally leaving work earlier than usual to do so. Respondent, specifically Pepa Kang, understood that these meetings had to do with the Union, and Jose Luis Mora Rodriguez was uncontradicted in his testimony that Supervisor and Owner Pepa Kang would tease the workers by asking them if they “were going to the Center where [they] would see [their] mothers, Adriana and Isaura [Lucero, union organizers].”

During the hearing Respondent presented what it claimed was a warning to Jose Luis Mora Rodriguez, dated November 23, 1992. By this warning, signed by John Kang, Jose Luis Mora Rodriguez was alleged to have been “disobeying orders given by the owner and the manager,” to have engaged in “disrespectful conduct by throwing [a] bundle of pants at the owner,” and having his wife punch his timecard when he was not at the factory. John Kang testified that when he confronted Jose Luis Mora Rodriguez with this warning that Jose Luis Mora Rodriguez told him that “he is going to bring trouble to my place.” Jose Luis Mora Rodriguez denied any knowledge of any warning, denied throwing anything at the owner, and denied ever having his wife punch his timecard, all in credible fashion.

Around that same time, Jose Luis Mora Rodriguez contacted Isaura. Isaura Lucero testified that she spoke several times, as early as November 24, 1992, to Respondent’s representatives about labor matters involving Jose Luis Mora Rodriguez and Alma Aleman. Isaura Lucero said that she told Pepa Kang and Pepe Kang that the purpose of the November 24, 1992 meeting was to stop the harassment which Jose Luis Mora Rodriguez and Alma Aleman were allegedly receiving (especially on union meeting days), as well as to stop their being prevented from talking to other workers. During this meeting Isaura Lucero testified she then gave Pepa Kang and Sun Alma Kang a letter which stated that:

The International Ladies Garment Workers Union/Justice Center, has been informed that you are unlawfully discriminating against Mr. Jose Luis Mora Rodriguez, Mrs. Alma Aleman and Benito Crisanto, because of their Justice Center membership and activities.

I find from the above testimony, which I found to be credible, that Respondent was well aware that Jose Luis Mora Rodriguez and Alma Aleman were union sympathizers and activists by November 1992.

As to the incident when Jose Luis Mora Rodriguez allegedly threw a bundle of pants at one of the supervisors, I find this event to be too far removed in time from Jose Luis Mora Rodriguez' and Alma Aleman's terminations to convincingly provide a rationale for Jose Luis Mora Rodriguez' eventual discharge in August 1993.

In February 1993, Jose Luis Mora Rodriguez was suspended for 1 day shortly after the broadcast of a television interview in which Alma Aleman and Jose Luis Mora Rodriguez discussed the conditions of garment workers.

Isaura Lucero credibly testified that when she talked to Respondent about this, Respondent claimed that Jose Luis Mora Rodriguez had been suspended for refusing to do certain types of work. Jose Luis Mora Rodriguez credibly testified that he was told to go home after he complained about piece rates that had been offered. These versions of the meeting are not incompatible. In fact, it appears to have been the policy of Respondent to on occasion suspend, and in at least one instance discharge, individual workers or groups of workers who complained about piece rates for particular jobs.

Jose Luis Mora Rodriguez was laid off for 3 days because of this incident. Jose Luis Mora Rodriguez complained about this layoff to the Union, which caused Isaura Lucero to go to meet with Sun Alma Kang at the factory. At this meeting Jose Luis Mora Rodriguez' layoff was discussed and Respondent agreed to pay Jose Luis Mora Rodriguez for 1 of the 3 days of the layoff.

Isaura Lucero and Sun Alma Kang also discussed an incident involving a physical altercation between Jose Luis Mora Rodriguez and the Respondent. Regarding this incident, it is clear that Alma Aleman's work station was being photographed by Respondent for some unknown reason having to do with Alma Aleman's collection of aluminum cans. Alma Aleman went to John Kang's office to determine why this had occurred. Jose Luis Mora Rodriguez, apparently seeing the events unfold from afar, headed toward John Kang's office as well. When Alma Aleman arrived, John Kang had asked his father, Pepe Kang, to leave the office. Pepe Kang got to the door just when Jose Luis Mora Rodriguez arrived.

John Kang testified that Jose Luis Mora Rodriguez tried to enter the office, and that Pepe Kang, who was blocking the way, told Jose Luis Mora Rodriguez not to come in. John Kang said that Jose Luis Mora Rodriguez then forced his way into the office and escorted Alma Aleman out of the office. In support of Respondent's version of the events, Respondent presented a "Notice of Warning to Employee," written for Jose Luis Mora Rodriguez and dated February 10, 1993, for "repeatedly disobeying orders given to you and showing disrespectful conduct and pushing the owner of this company." This document is not signed by Jose Luis Mora Rodriguez and the document states on its face that "Jose Luis Mora Rodriguez refuse [sic] to sign." It is, however, signed by John Kang, who is listed as "supervisor," and Moreno Conception, who is listed as a "witness."

In contrast to the above testimony, Jose Luis Mora Rodriguez claimed that Pepe Kang and a "representative from another company" grabbed him by his pants and shirt and took him out of the office, ripping his shirt and pants in the process. Jose Luis Mora Rodriguez denied any wrongdoing, and denied ever pushing Pepe.

Isaura Lucero testified that Respondent had asked Jose Luis Mora Rodriguez to sign a blank warning sheet during this time period, and that Sun Alma Kang admitted to this during a meeting with Isaura Lucero. This seems in conformance with Jose Luis Mora Rodriguez' denial of having ever seen any such warning. In fact, it seems likely that the blank warning sheet which Jose Luis Mora Rodriguez would not sign was later filled in and became an exhibit proffered by Respondent. Isaura Lucero further testified that as a result of her meeting with Sun Alma Kang, Respondent agreed to pay Jose Luis Mora Rodriguez for 1 day of Jose Luis Mora Rodriguez' suspension and agreed not to give Jose Luis Mora Rodriguez a disciplinary warning.

Regarding this incident, I conclude neither Jose Luis Mora Rodriguez nor Respondent's witnesses are fully credible. It seems most likely to me that whatever physical contact occurred in February was minor, and was viewed that way by all parties at that time. Otherwise, it seems unlikely that an incident of physical abuse, had it actually occurred, would have gone unpunished at the time that it occurred. Uncontradicted testimony by Isaura Lucero suggested that Respondent had agreed to drop disciplinary actions against Jose Luis Mora Rodriguez regarding the incident. This seems to me to be the most likely explanation for why Jose Luis Mora Rodriguez was allowed to continue in his position and why he was paid for 1 of the 3 days for which he was suspended. Therefore, Respondent's use of this unsigned form to justify its eventual discharge of Jose Luis Mora Rodriguez in late August is suspect, and raises an inference that Respondent was seeking to magnify the disciplinary record of its employee. An employer's distortion and magnification of an employee's deficiencies cast a deep shadow over a claim that mere business judgment was involved in the employee's termination. *Postal Service*, 256 NLRB 736, 738 (1981).

Respondent presented another alleged warning, dated February 10, 1993, entitled "Notice of Warning" to Alma Aleman for violating company policy by "repeatedly showing disrespect and disobeying given orders." The document states on its face that "Alma Aleman doesn't acknowledge this incident," is not signed by Alma Aleman, and Alma Aleman testified that she never saw this document. The document, however, is signed by John Kang as "supervisor" and Moreno Conception, who is listed as a "witness."

I find that Alma Aleman's testimony was credible. It seems likely to me that Respondent decided not to present this "Notice of Warning" to Alma Aleman, and dropped any thought it may have had of taking disciplinary action against Jose Luis Mora Rodriguez. Therefore, Respondent's use of this unsigned form to justify its eventual discharge of Jose Luis Mora Rodriguez in late August is suspect, and results in another inference unfavorable to Respondent. *Postal Service*, *ibid*.

Up through August, Jose Luis Mora Rodriguez continued complaining about the piece rates. During this same period Alma Aleman complained to the Union about Respondent's treatment of Jose Luis Mora Rodriguez. In response, the Union organized a meeting with Respondent. This meeting apparently did not resolve the tension at the factory, and after this meeting, Pepa Kang and Sun Alma Kang would sarcastically tell Alma Aleman to "go and complain [to her] mothers, Isaura Lucero and Adriana," and would call her a "mucho loco corazon negro." (A very crazy black heart.)

Also during this period, signaling rising tensions at the factory, Alma Aleman testified without contradiction that John Kang had gotten angry at her because of her complaints about piece rates and had tossed a cone of thread at her head. Alma Aleman complained about the incident to the Union, which sent Isaura Lucero to intervene on Alma Aleman's behalf. Despite the obvious tensions arising at the factory, I find that Respondent provided no credible evidence that Jose Luis Mora Rodriguez or Alma Aleman had received written warnings, or that they were in any way deficient in their employment duties.

Twice in August, Alma Aleman and Jose Luis Mora Rodriguez were interviewed on camera by television crews regarding labor issues amongst garment workers.

The first of these television interviews occurred on August 12, 1993, and corresponded to Alma Aleman's and Jose Luis Mora Rodriguez' involvement in union demonstrations and hearings held to publicize an alleged lack of minimum wage adjustments in the piece rate garment industry. On the morning of August 12, Alma Aleman and Jose Luis Mora Rodriguez asked to get off work to run some errands and were given permission by Pepa Kang. Both Jose Luis Mora Rodriguez and Alma Aleman then proceeded to participate in a protest, a union organized demonstration. Further, Alma Aleman gave testimony to the state agency and was interviewed that day for television cameras.

The next day, August 13, Alma Aleman went to work late that morning. On her way into the plant another employee mentioned that she had seen Alma Aleman on television and then proceeded to discuss the interview with Alma Aleman. Alma Aleman testified that Pepe Kang was present and could have heard this conversation. Later Alma Aleman saw Pepe Kang talking with several other employees, who were looking and pointing to her. Finally, when Alma Aleman was leaving for the day Pepa Kang called her into his office and Alma Aleman testified that Pepa Kang said, "There is no more work for you. You are to [go] collect unemployment benefits."⁹

Q. And what did you say to her?

A. (Through Interpreter) I said, "Why are you sending me home when there is too much work?"

Q. And what did she say?

A. (Through Interpreter) She said, "You are too much problem. There is no more work."

Alma Aleman then asked Pepa Kang if she could complete the work that she had started. Pepa Kang granted this request and she began to finish this project the next day, August 14.

Alma Aleman worked regularly until August 20. Moreover, on August 23, she was called by her husband, at Pepa Kang's request, to repair some of her previous work, a task which she began at 12:30 p.m. that day. On August 24, she came to work to continue with the repairs. That evening she was again interviewed on television about minimum wage violations in the garment industry. On August 25, Alma Aleman asked if she was to be paid for her time doing the repairs, to which Sun Alma Kang responded "no," because

"all the workers had to repair the work that they do wrong without pay."

Alma Aleman complained to Isaura Lucero of the Union about not being paid for this work. Isaura Lucero then called Sun Alma Kang to resolve this problem. That night Alma Aleman was again filmed by television crews when she left work. Alma Aleman was uncontradicted in her testimony that this filming was seen by Pepa Kang, as she watched from the door of the factory.

Alma Aleman continued working until she finished her assignments at 1 p.m. on August 27. At that point, Alma Aleman and her husband,¹⁰ Jose Luis Mora Rodriguez, and well as two other women were called into Sun Alma Kang's office and discharged. Unlike the other women, Alma Aleman testified that she and her husband were paid on the spot. When she asked Pepa why she had been fired, Pepa said that there was "no more work" and that that was the reason the other two ladies were leaving as well.

Jose Luis Mora Rodriguez stated that the Respondent never told them that they should call back to see if work was available. Regardless, Alma Aleman testified that she returned to the factory soon after these events and asked Sun Alma Kang for work. This request was not granted. Alma Aleman testified that she also telephoned in September asking for work and was again denied reemployment. Jose Luis Mora Rodriguez, on the other hand, admits having never returned or called about further employment.

On August 30, 1993, Isaura Lucero called to complain that the two other women who were discharged with Jose Luis Mora Rodriguez and Alma Aleman, "Carmen" and "Imelda," had already been rehired, although Jose Luis Mora Rodriguez and Alma Aleman were not rehired. To protest this perceived injustice, the Union demonstrated in front of the factory on September 17. Sun Alma Kang testified that she thought that the other women's names were "Maria" and "Delfina," and that they were not rehired for about 3 or 4 months. Respondent failed, however, to present any documentary evidence in this regard.

I find that the Respondent's failure to submit such evidence to clarify the issue of when the other discharged employees were rehired raises an inference that the evidence would have been unfavorable to it. For it is settled law that failure to testify about a point which would normally elicit a response, or failure of a party's counsel to ask a witness about an important point, raises an inference that the testimony would have been unfavorable to the party. *Advanced Installations*, 257 NLRB 845, 849 (1981). Further impairing Respondent's ability to successfully argue this point, I find that Sun Alma Kang's testimony was evasive on this issue. Considering the contentiousness of the events that unfolded shortly afterwards including a protest over the rehiring it seems extremely unlikely that she would not be aware of the date in which she rehired the other discharged employees. On the contrary, I find that Alma Aleman's testimony was credible. Therefore, I find that the employees discharged with Jose Luis Mora Rodriguez and Alma Aleman were rehired within a few days of this discharge.

Respondent proffered two documents as evidence that Alma Aleman and Jose Luis Mora Rodriguez were dis-

⁹This sentence was clarified by the interpreters immediately after this sentence shows up in the record. In the clarification, the word "go" appears.

¹⁰Erroneously referred to at least one point in the record as her cousin.

charged for lack of work or other nondiscriminatory reasons. First, Respondent submits the unfilled unemployment insurance claim forms in which Jose Luis Mora Rodriguez and Alma Aleman gave as reasons for leaving their jobs, "Me descansarje," and "Falta de trabajo" (lack of work). Jose Luis Mora Rodriguez explained that he responded in this way because "that's the reason they gave us for firing us. They said there was no more work and go to the unemployment office."

John Kang, despite not being at the office that day, took credit for the discharges and provided insightful testimony as to the reason underlying the discharge of Jose Luis Mora Rodriguez and Alma Aleman, as he says that he decided in June to fire them because of their "bad attitude[s]."

JUDGE HERZOG: But you didn't act on it until the end of August?

THE WITNESS: Yes. Because, well, Alma, I would talk to her and she would talk back to me. I talk to her several occasions just one on one. I feel like may[be] I could talk to her. To Jose Luis Mora Rodriguez, I refer to him as bad attitude. He always had bad attitude. So I figure this guy is someone I can't try to work out with.

John Kang also testified that Alma Aleman's discipline problems consisted of her "complaining about the prices of the majority of the goods that I need to produce." Later when asked why Sun Alma Kang had not called Jose Luis Mora Rodriguez and Alma Aleman back to work after their discharges, he testified as follows:

THE WITNESS: Because things would be better without them having working in my company.

JUDGE HERZOG: Could you tell the record why that would be?

THE WITNESS: Because I feel that they were not helping my company, but the opposite of that. They were disrupting my business.

When asked to explain, John Kang testified that Jose Luis Mora Rodriguez "would go out of his way to cause problems for my company," and "he was very difficult to work with." John Kang added that part of the difficulty was Jose Luis Mora Rodriguez "was lagging." Respondent, however, provided no evidence of Jose Luis Mora Rodriguez "lagging," nor did it present evidence as to warnings ever issued concerning this alleged deficiency.

In contrast, Sun Alma Kang testified that she had had several discussions about Alma Aleman dealing with what she called "disciplinary problems."

Q. Do you remember what the disciplinary problems were?

A. Sometimes they complain about price, sometimes problem with slow, no work, and sometimes they complain about bathroom is dirty, like this.

Q. Those were complaints that they were making right?

A. Yes.

Q. Did you have discussions with Alma Aleman about complaints that the company had with her performance?

A. No.

I find John Kang's testimony relating to Jose Luis Mora Rodriguez' "lagging," unconvincing. I credit, however, his implicit admission that the November and February disciplinary actions against Jose Luis Mora Rodriguez and Alma Aleman did not play a central role in Jose Luis Mora Rodriguez' and Alma Aleman's discharges. Further, I accept Sun Alma Kang's testimony as an admission that Respondent had at no time considered Alma Aleman's performance to be a problem. Finally, I find that the disciplinary reasons put forth for Jose Luis Mora Rodriguez and Alma Aleman's discharges are limited to complaints that Jose Luis Mora Rodriguez and Alma Aleman complained, were hard to work with, would talk back to the supervisors, and that Jose Luis Mora Rodriguez and Alma Aleman had "bad attitudes."

In attempting to demonstrate an absence of available work, John Kang testified that two of Respondent's biggest customers went out of business over the relevant period of time.¹¹ This is confirmed by the decline from approximately 160 employees in March 1993 to 80 employees in October 1993 with the majority of the decline occurring after May 1993. Further, by February 1994, Respondent had itself gone out of business. This general decline is confirmed by Respondent's exhibits demonstrating that over the relevant period several discharged employees wrote on unemployment compensation forms that they left their employment with Respondent because of lack of work.

In contrast, Ramiro Rodriguez testified that about 150 persons were working for Respondent when he started in 1988, and that there were about 200 persons working there both in January 1993 and in July 1993, thereby indicating that there had been no decline in employment.

I find that Respondent's evidence of its economic decline is credible. Therefore I find that there existed a need for the Respondent to reduce its labor force over the period in question. I also find, however, that the Respondent provides no evidence to support the method it chose to employ in selecting which employees to discharge, nor any evidence suggesting that Respondent had selected particular departments or job categories to discharge.

Counsel for the General Counsel asserts that Jose Luis Mora Rodriguez and Alma Aleman were discharged for their engagement in union and other protected activities in violation of Section 8(a)(1) and (3) of the Act.

Respondent argues that Jose Luis Mora Rodriguez and Alma Aleman were "terminated, along with others, for lack of work and need for their services."

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.

¹¹ John Kang testified that Respondent's largest customer, Cherokee, went into Chapter 11 bankruptcy during late 1992, and went out of business sometime in 1993. Further, John Kang said that Philipo, Respondent's second biggest customer, closed in 1993.

Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* formulation in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

In order to establish a prima facie case of a violation of Section 8(a)(1) or (3) counsel for the General Counsel must demonstrate:

1. That the employee was discharged.
2. Knowledge on the part of the employer that the employee was engaged in union activity.
3. That the discharge of the employee was caused by this activity.

Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009 (1985).

Since Respondent judicially admitted the terminations of Jose Luis Mora Rodriguez and Alma Aleman, the only contested elements involve Respondent's knowledge of their union activities and motivation in discharging these employees.

In this case there was substantial evidence both that Jose Luis Mora Rodriguez and Alma Aleman engaged in union activities over a long period of time, and that the employer knew of Jose Luis Mora Rodriguez and Alma Aleman's extensive union activity. For example, Jose Luis Mora Rodriguez and Alma Aleman had been attending meetings since August 1992 and there was testimony recounting how Pepa Kang had made fun of both employees for "going to the [Union] Center." Union organizers representing Jose Luis Mora Rodriguez and Alma Aleman either phoned or met with Respondent on several occasions and as early as November 1992 gave Respondent written notice of Jose Luis Mora Rodriguez' and Alma Aleman's union activities.¹² Further, just prior to their discharges, Jose Luis Mora Rodriguez and Alma Aleman participated in union organized demonstrations, hearings, and television interviews to which John Kang admitted to having knowledge. Hence, it is clear that Respondent had knowledge of Alma Aleman's and Jose Luis Mora Rodriguez' union activities.

Further, the timing of the discharges indicates that the employer was motivated by antiunion animus. Animus is established by evidence suggesting that an employer has an unlawful reason for the discharge, usually to discourage union or other protected activity. In this case several witnesses were uncontradicted in their testimony that Respondent had made derogatory remarks about Jose Luis Mora Rodriguez and Alma Aleman going to see their "mothers." Further, at the time of the discharge, Respondent's had already discharged Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jimenez for concerted action in violation of Section 8(a)(1), had told employees not to talk to Alma Aleman and

Jose Luis Mora Rodriguez because of their union involvement, and had interrogated an employee about his union activities.

Hence, I find that counsel for the General Counsel has made a sufficient showing of union animus. It follows that she has also made out a prima facie case, 8(a)(3) and (1) violations regarding Respondent's discharge of Jose Luis Mora Rodriguez and Alma Aleman.

The establishment of a prima facie case shifts the burden to the employer to demonstrate "that the same action would have taken place even in the absence of the protected conduct." Respondent appears to take the following approaches towards meeting this burden:

1. Respondent argues that Alma Aleman and Jose Luis Mora Rodriguez were discharged because of economic necessity.
2. Respondent argues that Alma Aleman and Jose Luis Mora Rodriguez were discharged because of their disciplinary history.

As noted above, I have credited Respondent's testimony that Respondent's business was required to make work force reductions over the period in question. Granting this point, however, to the Respondent does not satisfy the *Wright Line* requirement that the same discharge action "would have taken place even in the absence of the protected conduct." A mere need for labor force reductions does not grant an employer permission to eliminate union activists from a business's work force. *Hinkle Metal Supply*, 305 NLRB 522 (1991).

Respondent provides no credible evidence which might provide a rationale for its selection of Jose Luis Mora Rodriguez and Alma Aleman for discharge. Indeed, the testimony about disciplinary problems serves to show just the opposite. For an employer's distortion and magnification of an employee's deficiencies casts a deep shadow over a claim that mere business judgment was involved in the employee's termination. *Postal Service*, supra at 738.

There are, additionally, several factors which suggest that Respondent's claims are untrue. First, neither employee ever received any warning or notice informing of any lack of productivity. Second, there is uncontradicted testimony that Sun Alma Kang told Isaura Lucero that both Jose Luis Mora Rodriguez and Alma Aleman were "good workers." Third, during the period between August 13 and 27, Alma Aleman was given a special "emergency project." The assignment of this project suggests that there was a shortage of labor supply during this period, or is tantamount to recognition of Alma Aleman's adequate or superior skills. Either of these possibilities undermines Respondent's argument that Alma Aleman was selected to be discharged for economic reasons.

Further, Respondent gave no explanation for its timing of the discharges. The initial discharge of Alma Aleman on August 13 came on the heels of Alma Aleman's highly public union activities, which included a protest, testimony at a hearing, and a television interview. This discharge was apparently converted into a threat to discharge when Respondent not only allowed Alma Aleman to continue in the piece work project that she had started, but gave her another project, and later called her to complete corrections on the first job. Alma Aleman's permanent discharge, as of August 27, occurred within a few days of a television interview and

¹²For example, on November 24, 1992, Isaura Lucero gave Respondent a letter dated that same day containing the following passage: "The International Ladies Garment Workers Union/Justice Center, has been informed that you are unlawfully discriminating against Mr. Jose Luis Mora, Mrs. Alma Aleman and Benito Crisanto, because [of] their Justice Center membership and activities."

photography session related to working conditions amongst garment workers, an interview which took place in front of Respondent's factory just immediately following the Union's contact with Respondent to collect wages for time Alma Aleman spent making corrections.

Although Jose Luis Mora Rodriguez was not as active in his union activities as was Alma Aleman, he did attend the protest meeting conducted by the Union on August 13, 1993, with Alma Aleman. Further, Jose Luis Mora Rodriguez' activities need to be viewed within the context of his wife Alma Aleman's union activities. As the Fourth Circuit has recently held, when layoffs are economically justified, the invalidation of a single impermissible discharge will not serve to similarly invalidate all contemporaneous terminations, *Goldtex, Inc. v. NLRB*, 14 F.3d 1008 (4th Cir. 1994), and where the employees are husband and wife, discharging an employee in retaliation for his or her spouse's union activities is an unfair labor practice. In this case it is reasonable to infer that Jose Luis Mora Rodriguez' discharge, which occurred simultaneously with that of his wife, a vocal union activist, was at least partially a retaliation against Alma Aleman's activities. As such it constitutes a violation of Section 8(a)(3) and (1) of the Act, and was designed to interfere with employees' rights to self-organization guaranteed by Section 7 of the Act. *Tecmec, Inc.*, 306 NLRB 499 (1992); *Waterbed World*, 286 NLRB 425 (1987); *Pony Express Courier Corp.*, 283 NLRB 868 (1987).¹³

E. Violations of Section 8(a)(1) of the Act

1. Instructing employees not to talk to union activists

The complaint alleges that sometime in late July or early August 1993, Pepa Kang instructed employees not to talk to known union adherents.

Francisco Maldonado testified in uncontradicted testimony that the first such incident occurred after a meeting in July 1993, held between Supervisors Pepa Kang, Pepe Kang, Sun Alma Kang, employees Alma Aleman and Jose Luis Mora Rodriguez, and Union Organizer Isaura Lucero. After this meeting Pepa Kang stated to Francisco Maldonado that Alma

Aleman and Jose Luis Mora Rodriguez were "too much problem," that they were very bad ("mucho malo"), and that they had black hearts ("corazon negro"):

Q. Did she say anything about your talking to them?

A. (Through Interpreter) Yes, she told me not to talk to them because they were bad.

Q. After that, did Pepa say that to you again?

A. (Through Interpreter) Yes she told me that several times.

Q. How often did she say that to you?

A. Sometimes two or three times a day.

Francisco Maldonado testified that these instructions continued through August during work and break times.

These instructions were limited initially to Francisco Maldonado, but was later made to other employees as well as Francisco Maldonado. As Francisco Maldonado testified, Pepa Kang spoke to Francisco Maldonado and several other employees in early August 1993, as follows:

Q. What did Pepa say to this group of five or six employees?

A. (Through Interpreter) That Jose and Alma had been saying bad things about them.

Q. What did Pepa tell the employees about that?

A. (Through Interpreter) No, she would say not to talk to them.

Q. Did Pepa repeat that to you also?

A. (Through Interpreter) Yes.

Q. How often?

A. (Through Interpreter) Sometimes two or three times a day, the same thing.

Q. Did she say anything to you as you clock out at the end of the day?

A. (Through Interpreter) The same thing she would say again, not to talk to them because they were too bad and black heart.

I find Francisco Maldonado to be a generally credible witness. Additionally, all such testimony was uncontradicted by any of Respondent's evidence. Specifically, Respondent failed to call Pepa Kang to testify on these matters. It is a well-accepted rule that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (citing 2 Wigmore, *Evidence* § 286 (2d ed. 1940); McCormick, *Evidence* § 272 (3d ed. 1984); *Greg Construction Co.*, 277 NLRB 1411 (1985); *Hadbar*, 211 NLRB 333, 337 (1974). An inference that the witness would have testified adversely to the party may be inferred in these situations especially where the missing witness is the a member of family and management alleged to have been the violator. I therefore accept Francisco Maldonado's account of these events. This account demonstrates that Respondent told employees on several occasions not to talk to employees who were union activists because, in Respondent's view, such employees were "bad" and had "black hearts."

In my opinion, Pepa Kang's reference to Jose Luis Mora Rodriguez and Alma Aleman's "black hearts," and to their being "bad," are terms, which like "bad attitude," were no

¹³ Respondent argues that, "where economic reasons for termination exist, coupled with that which, as here amounts to a mere suspicion that termination occurred for improper and protected reasons, the economic factors must prevail." citing *NLRB v. Freeman Co.*, 471 F.2d 708 (8th Cir. 1972). Respondent's reliance on *Freeman* is misplaced.

First, although some of the message of *Freeman* may be still valid, it has long since been superseded by the Board's and the Supreme Court's *Wright Line* test for causation. Unfortunately, nowhere in Respondent's brief is the *Wright Line* test mentioned. Nor are any of the elements of the test discussed. Nor is Respondent's reliance on *Freeman* harmonized with the Board's current reliance on the *Wright Line* test.

Second, the facts of *Freeman* are not supportive of Respondent's case. Indeed, they support a conclusion opposite to that of Respondent's. In *Freeman* union bargaining members claimed to have been discriminated against in cutbacks of their hours of work. The Eighth Circuit relied on the fact that the "company acted company-wide with a uniform policy and reduced the hours of all employees." In this case, however, no testimony was given about how Respondent reached the decision to carry out its required layoffs. Further, rather than a mere "naked suspicion," The General Counsel has established the required *Wright Line* prima facie case.

more than euphemisms for those harboring union sympathies. Cf. *L. S. Ayres & Co.*, 221 NLRB 1344 (1976).

The Board finds that the right of employees to organize for collective bargaining is a strong Section 7 right, "at the very core of the purpose for which the NLRB was enacted." *New Process Co.*, 290 NLRB 704, 705 (1988). In any litany of the ways in which employees organize themselves for collective bargaining, their day-to-day discussions and interchange of ideas must surely rank very high. For this reason it is regarded as protected activity. Thus, an employee's efforts to speak with and convince others of the validity of his ideas and feelings about the cause of unionism must generally be regarded as protected as well.

The right of employees to communicate with each other concerning the desirability of organizing is one which is protected by Section 7 of the Act. For, the effectiveness of organization rights "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." *Central Hardware v. NLRB*, 407 U.S. 539, 543 (1972). "Direct personal contact is the most truly effective means of communicating not only the option of collective bargaining, but the most compelling reasons for exercising that option." *Belcher Towing Co.*, 256 NLRB 666 (1981). Consequently, in seeking to discuss the desirability of selecting the Union as their bargaining representative, the employees exercise a right guaranteed to them by Section 7 of the Act.

"No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." (Citation omitted.) *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). The facility where employees work has long been recognized as a "place uniquely appropriate" for exercise of that right of employees. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 fn. 6 (1945).

Thus, absent a valid rule, or special circumstances, employees are protected in such discussions. *Hambre Hombre Enterprises*, 228 NLRB 136 (1977).

Through the years the Board has balanced the rights of employees to organize against the legitimate property right of employers to have their workplaces be as productive as possible. As a consequence, the Board's Rule is that an employer may forbid employees to talk about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to all other subjects not associated or connected with their work tasks.

An employer may lawfully forbid employees to talk about a union during periods when they are supposed to be working, if that prohibition also extends to all other subjects not associated or connected with their work tasks. *Orval Kent Food Co.*, 278 NLRB 402, 405, 407 (1986). However, where the instruction is discriminatorily promulgated the instruction is violative of Section 8(a)(1). *Teksid Aluminum Foundry*, 311 NLRB 712 (1993).

Here, where the sole instruction was to avoid talking with certain union activists, the discriminatory promulgation is obvious on its face. Further, it is uncontested that Respondent made no distinction between working and nonworking time

in its instruction not to talk to Jose Luis Mora Rodriguez and Alma Aleman. Thus, the instruction was violative of Section 8(a)(1) of the Act. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

Therefore, I find that Pepa Kang's direction to Francisco Maldonado and other employees not to talk to Jose Luis Mora Rodriguez and Alma Aleman was a violation of Section 8(a)(1) of the Act.

2. Interrogation

The complaint alleges that sometime during mid to late August 1993, Sun Alma Kang, at the facility, interrogated employees about their union affiliation and support and about their fellow employees' union activities and support.

The evidence which counsel for the General Counsel adduced in support of this allegation is found in Francisco Maldonado's testimony as to one event.

Francisco Maldonado was uncontradicted in his testimony that when going to pick up an order ticket in Sun Alma Kang's office, Sun Alma Kang questioned Francisco Maldonado about whether he planned to go with Jose Luis Mora Rodriguez to the union meeting ("Centro").¹⁴ When he told Sun Alma Kang that he was not going, Sun Alma Kang responded that it was very good that he was not going to attend.

I find Francisco Maldonado's uncontradicted testimony to be credible and accept his testimony about the content and character of this meeting.

Interrogation of an employee concerning his union sentiments is not a per se violation of the Act. In determining whether or not a violation of Section 8(a)(1) has occurred the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186-187 (1992). Factors which the Board has examined include:

1. The history of employer hostility towards, or discrimination against, union supporters.
2. Whether the employer's statements were made in a context free of other unfair labor practices.
3. The length and threatening nature of the questioning.
4. Whether there was any threat of retaliation.
5. Whether the conversation was casual and amicable.
6. The supervisory level of the interrogator. [Id.]

If this event had occurred in a context absent other evidence of the circumstances in which this conversation occurred I would find that this incident fell within the realm of permitted employee interrogation. In this instance, however, the interrogation occurred shortly after three employees, active in union meetings, had been discharged for protected concerted activities in violation of Section 8(a)(1). Further, the employer repeatedly made derogatory statements about union supporters as being "black hearts" and "bad" on a nearly daily basis, and teased union supporters who were departing the factory to attend union meetings. Further, after

¹⁴ Francisco Maldonado understood her question to be aimed at whether he was going to the Union's Justice Center.

Francisco Maldonado responded to an inquiry that he was not planning on attending an upcoming union meeting, Sun Alma Kang, according to uncontradicted testimony, told Francisco Maldonado that it was “very good that [Francisco Maldonado] was not going.” Given that Sun Alma Kang was a part owner and Francisco Maldonado’s supervisor, it is difficult to imagine that this conversation would not have a coercive effect on an employee.

Therefore, I find that the Respondent’s interrogation of Francisco Maldonado constituted a violation of Section 8(a)(1) of the Act.

3. Threats of termination

The complaint alleges that about August 13, 1993, Pepa Kang, at the facility, threatened employees with termination because they engaged in union activities or supported the Union.

In support of this allegation counsel for the General Counsel offered the testimony of Alma Aleman, concerning the events of August 13, 1993, approximately 2 weeks prior to her final discharge:

Q. And what did Pepa say to you?

A. (Through Interpreter) She called me to the office and told me, “There is no more work for you. You are to collect unemployment benefits.”

Q. And what did you say to her?

A. (Through Interpreter) I said, “Why are you sending me home when there is too much work?”

Q. And what did she say?

A. (Through Interpreter) She said, “You are too much problem. There is no more work.”

Q. And do you recall having a conversation with Pepa the next day about your appearance on TV?

A. (Through Interpreter) Yes. She told me that my husband and I did not need to work at the factory anymore because we were imitating the TV stars.

I find Alma Aleman’s testimony credible as pertains to this conversation. Opposing it, there is no testimony offered by Respondent to oppose this version of the events. Respondent failed to call Pepa Kang as a witness despite Pepa Kang’s obvious ability to rebut Alma Aleman’s testimony. Therefore, I find that the above conversation occurred as Alma Aleman testified.

Rather than being immediately discharged, Alma Aleman was allowed to finish the project that she had started. In fact, Respondent assigned her further work, prior to releasing her on August 27.

Therefore, I find that the conversation on August 13 was not a notice of discharge, but was instead a threat, intended to operate as a “cocked pistol” to make Alma Aleman cease her union activities. This interpretation is supported by Alma Aleman’s discharge on August 27, immediately after she appeared on television to discuss working conditions amongst garment workers and had the Union represent her on obtaining wages for “correction” work.

It is well established that statements that a known union activist employee causes problems, or is a troublemaker, absent actual documentation of these incidents, are regarded as simply euphemisms, demonstrating an employer’s dissatisfaction with an employee’s union activities. *L. S. Ayres & Co.*,

221 NLRB 1344 (1976); *NLRB v. Shawnee Industries*, 333 F.2d 221 (1964). Respondent made numerous and continual references to Alma Aleman in testimony, as causing problems and complaining. In fact, on August 13, in the same sentence in which Sun Alma Kang explained the reason for the discharge to Alma Aleman as related to not having work, Sun Alma Kang also stated that “You are too much problem.”

Inconsistently, Respondent allowed Alma Aleman to continue working on the project she had just started, gave her a new assignment, and then called Alma Aleman back to complete “corrections” on the first assignment. Therefore, I find that despite the explicit language to the contrary, the August 13 discharge was in fact, a threat to discharge for continued union activity. This threat was carried out when Alma Aleman, 2 weeks later was interviewed in front of the factory by television stations as part of a union effort to enforce the minimum wage in the garment industry, and after Union Organizer Isaura Lucero intervened to collect wages for the time Alma Aleman spent making corrections. Respondent has made no attempt, either on brief or through testimony at the hearing, to refute this allegation.

I find and conclude that counsel for the General Counsel has demonstrated that a threat was made against Alma Aleman with the intent of coercing her into not exercising her Section 7 rights, all in violation Section 8(a)(1).

Summarizing, I find and conclude that counsel for the General Counsel has proven each allegation made or contained in the complaint.

CONCLUSIONS OF LAW

1. Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. Sun Alma Kang, Pepe Kang, Pepa Kang, and John Kang are, and at all material times have been, supervisors of Respondent within the meaning of Section 2(11) of the Act, and have been, and are now, agents of Respondent within the meaning of Section 2(13) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by discharging employees Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez.

4. Respondent violated Section 8(a)(3) and (1) of the Act by laying off and discharging employees Alma Aleman and Jose Luis Mora Rodriguez.

5. Respondent violated Section 8(a)(1) of the Act by its instructions to employees not to talk to union adherents.

6. Respondent violated Section 8(a)(1) of the Act by threatening to fire Alma Aleman on August 13, 1993, prior to her final discharge.

7. Respondent violated Section 8(a)(1) of the Act by interrogating an employee concerning the employee’s union activities, sympathies, or leanings.

THE REMEDY

Having found that the Respondent has violated the Act, it shall be ordered to cease and desist therefrom, and to take certain affirmative actions, including the posting of an appropriate notice, designed to effectuate the purposes of the Act.

Respondent shall be ordered to rescind its unlawful layoffs and discharges of its employees, Santiago Rodriguez, Ramiro Rodriguez, Alonzo Jose Jiminez, Alma Aleman, and Jose Luis Mora Rodriguez, and to offer them immediate, full, and unconditional reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for all losses of pay and benefits, including seniority and other rights and privileges sustained by them as a result of Respondent's unlawful actions against them. Backpay and benefits shall be with interest, computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁵ Respondent shall also expunge from its records all references to the unlawful layoffs and discharges of the above-named employees, and shall inform them in writing that this has been done and that such unlawful actions will not be used against them in any manner in the future. Respondent shall also preserve all necessary records for backpay and benefits, and make them available to the Regional Director for Region 21 or his representatives.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, World Fashion, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off and/or discharging its employees, Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez, because of their having engaged in concerted activities.

(b) Laying off and/or discharging its employees, Alma Aleman and Jose Luis Mora Rodriguez, because of their support for the Garment Workers' Justice Center, International

¹⁵ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Ladies' Garment Workers' Union, Western States Region, AFL-CIO or other engagement in union activities.

(c) Interrogating employees concerning their own union activities and/or the union activities of their fellow employees.

(d) Instructing employees not to talk to union adherents.

(e) Threatening to discharge employees for their union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions which are necessary to effectuate the policies of the Act.

(a) Rescind the unlawful layoffs and discharges of employees Santiago Rodriguez, Ramiro Rodriguez, Jose Alonzo Jiminez, Alma Aleman, and Jose Luis Mora Rodriguez, and offer each of them full and unconditional reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, and make them whole for all losses of wages and benefits, with interest, as set out in the remedy section, and restore all rights and privileges, including seniority, to them.

(b) Expunge from its files any references to the unlawful actions taken against Alma Aleman and Jose Luis Mora Rodriguez on August 27, 1993, and the unlawful actions taken against Santiago Rodriguez, Ramiro Rodriguez, and Jose Alonzo Jiminez on July 13, 1993, and inform these employees in writing that this has been done, and that these unlawful acts will not be used against them in the future in any manner.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel record and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix, both in English and in Spanish."¹⁷

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."